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Supreme Court, U.S.
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No. 93-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

GERARD A. MILLER,

Petitioner.

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals for the Second Circuit err in refusing to apply the standard of review set forth by the Third Circuit in *SEC v. Warren*, 583 F.2d 115 (3d Cir. 1978) to petitioner's request for relief?

2. Does the standard of review set forth in *U.S. v. Swift & Co.*, 286 U.S. 106, 52 S.Ct. 460 (1932) apply to a petition to remove a censure entered by the SEC, where petitioner does not seek relief in derogation of that original order?

3. Has the SEC erred in refusing to apply the standard of review set forth in *SEC v. Warren*, 583 F.2d 115 (3d Cir. 1978) to petitioner's request, where the SEC did not appeal that decision?

LIST OF PARTIES

The parties to the proceeding below were, and before this Court, are, the petitioner, Gerard A. Miller, and respondents, U.S. Securities and Exchange Commission.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Gerard A. Miller, respectfully prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceedings on June 29, 1993.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Second Circuit is reported at 998 F.2d 62 (2d Cir. 1993) and is reprinted in the appendix hereto, p. 1a, *infra*. The Order of the Securities and Exchange Commission of

September 1992 is reprinted in the appendix hereto, p. 8a, *infra*.

JURISDICTION

Appellate jurisdiction arose under the Securities and Exchange Act of 1934, 15 U.S.C. § 78y, contemplating judicial review of a final order of the Securities and Exchange Commission. Miller, a resident of New York, brought the Appeal in the Second Circuit. The jurisdiction of this Court to review the opinion of the Second Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Petitioner invoked no statute below, and invokes no statute before this Court, seeking instead review of SEC action under decisions of this Court and the Second and Third Circuits. The SEC has placed in issue sections 15 (b)(4)(E) and (b)(6) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78o(b) (4) (E) and 78o(b) (6).

STATEMENT OF THE CASE

Gerard A. Miller ("Miller," or "Petitioner") petitioned the Securities and Exchange Commission ("SEC") to set aside a censure entered by consent against him in 1985.[1] The principle reason cited for

[1] The SEC subsequently contended the censure in its final form was entered in February of 1986. In light of the Second Circuit's emphasis on the timing of the petition below, the precise chronology of events at the time of the censure, including the timing of the censure, should be developed in the record before the SEC following a remand, if remand is deemed the appropriate remedy.

removing the censure was the concealment from petitioner of a 1982 Letter of Admonition issued by the Enforcement Division of the New York Stock Exchange ("NYSE"). That highly material letter, sanctioning Kidder Peabody & Co., Inc. ("Kidder") in 1982 for the same type of conduct at issue in the 1985 SEC censure, was withheld from petitioner during the course of petitioner's tenure on Kidder's Director of Operations, and during the course of the SEC investigation when petitioner was preparing his defense. Had petitioner known of that Admonition Letter in 1982, his priorities and time allocations thereafter would have been vastly different. Had petitioner known of the Letter in 1984-85, his defense in the SEC investigation would have been quite different. Petitioner was censured by the SEC in 1985 for allegedly aiding and abetting Kidder's violations of the SEC's Rule 15c3-3 (17 C.F.R. § 240.15c3-3). The rule requires that customer owned securities be delivered into the customer's account after purchase, and corresponds to a requirement that brokerage firms maintain sufficient capital on hand to protect customer funds. The Kidder practice complained of by the SEC, characterized as "dual usage," entailed Kidder's use of securities on lists of proposed short term collateral to Kidder's lenders, and in conjunction with repurchase agreements, where the securities in question had been delivered into customer accounts. The practice occurred on six different days in early 1984 as the result of ineffective communications between departments where one department delivered a security owned by Kidder into a customer account, while another department listed the same security on an "agreement to pledge" loan, or repurchase agreement. The lag time between the point at which a

security was delivered to a customer account, and the point at which that fact was communicated to Kidder's stock/loan department led to the instances of so-called dual usage in 1984. Petitioner consented to a censure alleging that Petitioner aided and abetted Kidder because one of the three Kidder departments involved in the communication was under petitioner's direction. (At the time, petitioner was unaware that his corporate superior had suppressed evidence tending to exonerate him. *See infra*, p. 6.)

The dual usage occurred despite petitioner's efforts, as Kidder's Director of Operations, to bring it to an end from 1983 forward. The practice continued despite petitioner's efforts primarily because petitioner's corporate superior, the Chief Operating Officer of Kidder, John T. Roche ("Roche") interpreted the term "use" in a manner conflicting with the position the SEC took in 1985. Thus, since the late 1970's, Roche held the view that "agreement to pledge" loans were not secured loans, hence the securities listed in documenting such loans had not been put to use. Petitioner disagreed with that view, as did the SEC. Internal Kidder documents which are a part of the record below show that petitioner took the position that the "agreement to pledge" loans were a collateralized use of securities by Kidder, and should be tracked on a current basis through an on-line computer system. Roche and other members of senior management at Kidder delayed implementing such a computer system, even though Roche himself acknowledged the need as early as 1981. The information lag between departments thus continued into 1984, when the instances of dual usage leading to petitioner's censure occurred.

Central among petitioner's efforts to curb dual usage at Kidder was petitioner's 1983 Action Plan, which, among other things, advocated use of an on-line computer system to permit current tracking of securities. The plan was adopted by the NYSE as a part of Kidder's operations procedure. The plan was one of several responses prepared by petitioner to inquiries from the Audit Department of the NYSE regarding occurrences of dual usage. Petitioner responded fully and satisfactorily to every such audit inquiry.

Petitioner alone, however, could not put an end to the practice at Kidder. Petitioner directed only one of the departments involved in the process of allocating and tracking securities. The other two departments reported to Roche, through persons other than petitioner. Roche persisted, until 1986, in holding the view that "agreement to pledge" loans did not constitute a "use" of securities. Roche also continued to delay implementing an on-line computer system. For petitioner to enact a complete cessation of the practice of dual usage would have required support from Roche—support which Roche did not supply.

The underlying securities law violation by Kidder is one highly technical in nature, dealing with application of computer programming to securities tracking, and turning on an interpretation of the nature of an "agreement to pledge" loan. The violations occurred on six occasions in early 1984. Petitioner's censure arose from the fact that he directed one of Kidder departments involved in the dual usage practice. The record is devoid of any suggestion of actual harm to customers. Nor did the SEC allege such harm. (The SEC's September 1992 Order alleged that

customers' funds were placed "at risk," which contradicts the statement in the SEC's 1985 papers: "The staff has not asserted that. . .Kidder did not have sufficient quantities of securities on hand to fulfill its obligations.") The dollar amounts in question did not materially impair Kidder's capital position, nor did the SEC allege such material impairment.

After consenting to the censure, petitioner learned in the course of a NYSE investigation (triggered by the SEC case) that his corporate superior, Roche, the Chief Operating Officer of Kidder, had withheld a key letter from petitioner (and the SEC) for a period of years. This Letter, from the *Enforcement* Department of the NYSE, admonished Kidder for the so-called dual usage practice during the period since 1979. Petitioner thus learned that the dual usage had been of far greater regulatory concern in 1982 (during his tenure as Director of Operations at Kidder) than he had previously been aware. Had petitioner known of the Letter, it could have been a key element of petitioner's defense in the SEC investigation. As it was, Roche concealed the Letter for four years.

Petitioner brought his petition because of the inequitable circumstances under which the censure was entered in the first place, and because his experience since the censure demonstrated that the dual usage practice had not occurred under his actual supervision. Moreover, the censure has had a continuing negative impact on petitioner's employability, resulting in loss of one position, a period of unemployment, and withdrawal of a significant employment opportunity. Petitioner emphasized before the SEC that he did not seek to modify the 1985 SEC order so that he may engage in conduct in derogation of that order. To the

contrary, petitioner emphasized that he did not seek to permit the circumstances to arise in which dual usage might occur, that he agreed with the SEC's view of "agreement to pledge" loans as a "use" for purposes of customer protection and net capital calculation, and that had he known of the heightened regulatory concern between 1982 and 1986 he would have altered his own priorities during that time to prevent the instances of dual usage which did occur. The SEC's Division of Enforcement opposed petitioner's request on the ground that the discovery of the suppressed Letter of Admonition did not meet the substantial burden set forth in *U.S. v. Swift and Co.*, 283 U.S. 106 (1932). The SEC's Enforcement Division also argued that insufficient time had passed to warrant setting aside the censure, *i.e.*, petitioner's request was premature. Petitioner emphasized (1) the reasons why the *Swift* standard should not be applied to petitioner, and, (2) that a review of the record in light of Roche's suppression of the Letter of Admonition, viewed in light of *SEC v. Warren*, 583 F.2d 115, 120-21 (3d Cir. 1978), and *King-Seeley Thermos Co. v. Aladdin Industries, Inc.*, 418 F.2d 31, 38 (2d Cir. 1969) standard of review, led to the conclusion that petitioner did not aid and abet a violation of Rule 15c3-3 because all of petitioner's efforts were aimed at the discontinuation of the occurrences of dual usage. By Order of September 21, 1992, the SEC denied Petitioner's request. The September 1992 Order fails to distinguish between the procedural posture where the *Swift* standard should apply, *i.e.*, where a defendant seeks modification to escape the purpose of the original order, and a procedural posture where *Swift* does *not* apply, *i.e.*, where, as here,

a petitioner does not seek to engage in a practice in derogation of the original order.

The Court of Appeals ostensibly decided petitioner's appeal on the question of timing, rather than the issues before the SEC. The central language on the issue of timing is as follows:

> No matter which standard is used here, Miller's substantial delay in seeking to vacate his censure undercuts his contention that had he known of the NYSE letter, he would not have entered into a consent decree but instead would have asked for an adjudication of the charges against him. He knew of the existence of the letter from the NYSE within days of the censure, yet failed to object to the censure at that time. He waited a full six years to seek this relief. In denying his petition for review, we have looked not only at the number of years that have elapsed, but also at Miller's explanation for the delay. In this case, Miller had all of the information that he needed to protest the consent order when he obtained the letter. Nevertheless, Miller does not tell us why he could not have objected to the consent order soon after discovering the letter.

Opinion, p. 5-6a, *infra*.

In his appeal, petitioner asked the Second Circuit to apply the standards and result of *SEC v. Warren*, 583 F.2d 115, 120-21 (3d Cir. 1978). That case reflected the influence of the Second Circuit opinion in *King-Seeley*. That opinion called for application of a standard other than *Swift*, where the factual circum-

stances were so distinct as to justify a separate standard. Petitioner contends that under the *Warren* standard, the SEC would be required to lift the censure. The Second Circuit opinion is silent about *Warren*, and refused to apply *King-Seeley* to the SEC despite the Third Circuit's reliance on *King-Seeley* in setting forth a separate standard on *Warren*.

The narrow effect on petitioner of the Second Circuit opinion was to deny petitioner relief on the basis of an issue—delay—that he did not have an opportunity to address in the record before the SEC. The broader effect is to hand down an opinion relating to the issuance of the standard of review of a petition to set aside a sanction before the SEC which (1) conflicts with the standards laid down previously by the Third Circuit in *Warren*, (2) implicates a line of Supreme Court cases commencing with *Swift*, and (3) overlooks the SEC's disregard of judicial precedent at the Circuit Court level.

REASONS FOR GRANTING THE WRIT

I. The Second Circuit's Refusal To Apply The Standards Set Forth in *SEC v. Warren* Conflicts With That Holding in the Third Circuit

Without even a reference to that clearly dispositive authority, the Second Circuit passed over petitioner's request to be treated in accordance with the precedent in the Third Circuit, addressing facts such as petitioner's: a sanction entered by consent in response to allegations of a purely technical (*i.e.*, isolated and non-fraudulent) violation of a regulation arising under the Securities and Exchange Act of 1934. In so doing, the Second Circuit relied on an issue—timing—which was not framed and addressed in the record before

the SEC. The Second Circuit has then created a confusing precedent in two respects: (1) it fails to recognize dispositive precedent in the Third Circuit addressing cases such as petitioner's; (2) it adds a new element—timing—to petitioner's claim, an element which is not grounded in statutory or case law, and which in fact runs contrary to the express standards of the SEC on the issue.

The dispositive authority is *SEC v. Warren*, 583 F.2d 115 (3d Cir. 1978).[2] Petitioner's contention that *Warren* is dispositive of Petitioner's case is derived from two points: (1) the material facts of *Warren* are indistinguishable from those of the present case; and (2) the SEC has tacitly acknowledged that, if the standards of *Warren* apply, the relief petitioner seeks should be granted.

First, *Warren* applies and is dispositive in every material respect. That case concerned a sanction entered by consent. The underlying conduct was technical in nature—Warren involved a violation of the SEC's margin lending regulations; petitioner was censured for Kidder's violation of the SEC's customer

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[2] Other Circuits have, since the *King-Seeley* case, applied the *Swift* standard to petitioners seeking removal of a sanction imposed by the SEC, or imposed judicially at the behest of the SEC. *See, e.g., SEC v. Blinder Robinson & Co.*, 855 F.2d 677 (10th Cir. 1977), cert. denied, 489 U.S. 1033 (1989); *SEC v. Advance Growth Capital*, 539 F.2d 649 (7th Cir. 1976); *SEC v. Jan Dal Oil & Gas, Inc.*, 433 F.2d 304 (10th Cir. 1970). In each case, the petitioner sought, as in *Swift*, to resume conduct otherwise proscribed, and/or the case entailed systematic widespread fraud. As noted, petitioner, like the petitioner in *Warren*, does not seek to engage in conduct in derogation of the original order. These cases, therefore, are not directly germane to the circuit conflict issue raised in this petition.

protection and net capital calculation requirements in the absence of any suggestion that any customer was harmed or that Kidder's capital was in any way impaired; *Warren* and petitioner's case both involved an isolated violation of an "esoteric" area of the law, a violation for which no motive is ascribed; and, the injunction in *Warren* and the censure in petitioner's case are narrowly focused. These elements, which distinguish *Warren* and petitioner's case are from *Swift* in every material respect, merit quoting in full from *Warren*:

> It is evident that the type of conduct enjoined in the instant case—described by the district court as a technical violation of the margin requirements intended to contain credit—in no way approaches the outrageous conduct enjoined in *Swift*. The monopolistic misconduct enjoined in *Swift* not only affected the nation's economy, but the injunction was aggressively resisted by the defendants after the decree and the defendants had the position and power at the time modification was sought to continue to perpetuate their objectionable conduct.
>
> In the instant case, we have a single isolated offense in an esoteric area of law. The violation committed was voluntarily undone by repayment of the loans within six months and never again renewed. In view of the assets available to Warren, Jr., and to WAOC for collateral to completely comply with the existing marginal requirements, it is difficult to ascribe any motive for the violation.

> The circumscribed misconduct of the defendants is reflected in the narrow thrust of the injunctive decree—restraining them from filing a Form U-1 pursuant to Regulation U which is false, misleading, and does not accurately reflect the purpose of the loan, or obtaining credit for the purpose of purchasing any margin security in excess of the amounts allowable under margin restrictions of the federal securities laws. Unlike *Swift*, the defendants here have not resisted the injunction but have continuously submitted to it. Unlike *Swift*, there is no great public or national interest to be served by an injunction in essence against a single individual. Unlike *Swift*, the elimination of the improper practice and the purpose of the injunction appear to have been fully achieved.
>
> In effect, the injunction merely requires defendants "to obey the law" in the future when obtaining loans for the purchase of margin securities, a requirement with which they must comply regardless of the injunction. Dissolution of the injunction decree removes the possibility of contempt proceedings in the event of a future violation; the right to prosecute criminally or proceed civilly still exists.

SEC v. Warren, 583 F.2d 115, 120-21 (3d Cir. 1978).

Although this passage was set forth in full in petitioner's brief below, the Second Circuit Opinion is silent on the question of whether *Warren* would even apply to petitioner's case.

Secondly, the contention that *Warren* is dispositive of petitioner's request derives from the SEC's tacit admission. Petitioner contends that *Warren* applied to his case and would result in removal of the censure. The SEC response is a single point: that *Warren* is "contrary to the weight of authority." While petitioner would challenge that assertion vigorously on the merits in briefing before the Court, the SEC's silence on petitioner's second argument is compelling: if *Warren* does apply to petitioner's case, then petitioner's relief should be granted.

In sidestepping any reference to *Warren*, the Second Circuit instead relied on an issue which had *not* been briefed before the SEC, and added a new element to petitioner's case: "delay" in bringing the petition. This element has no foundation in case law or governing statutes. This new element, imposed without reference to authority, will inevitably cause confusion to future petitioners such who will lack clear guidance on the question of the appropriate time at which to seek removal or modification of a sanction. Moreover, the element of timing was imposed without allowing petitioner to place in the SEC record the reason for bringing his petition in 1991 rather than in 1986.

The issue of timing also involves a reversal of position by the SEC in the record of this case, to petitioner's legal detriment. Before the SEC, the SEC's Division of Enforcement, relying on SEC precedent, *opposed* petitioner's request for relief in part on the ground that petitioner had waited "only six years" to petition the SEC.[3] Thus petitioner limited

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[3] In addition, the SEC's Rule 29 (17 C.F.R. § 201.29) govern-

his argument to contending that the authority referenced by the SEC did not require petitioner to delay any further in seeking relief. The SEC's final order in response to the petition reversed this approach: the SEC accused petitioner of a "lengthy delay" and denied his petition in part on that basis. Because the petitioning process addressed the issue of whether petitioner should delay further prior requesting relief of the SEC, petitioner was given no opportunity to explain why he waited 6 years to submit this petition.

The SEC compounded the contradiction on appeal, suggesting that petitioner's "delay" connoted the absence of harm. The "delay" issue was merely an elaboration on the harm issue. Petitioner argued that the "delay" issue was misplaced, because, under *Swift*, the result would not have been any different had petitioner brought his request in 1986 as opposed to 1992; and that, in any event, the SEC had taken inconsistent positions on the timing issue. The Second Circuit adopted the SEC's "delay" argument, holding that the "delay" suggested the absence of intent to contest the charges, and that petitioner had not stated a persuasive rationale for delay. This conclusion was erroneous because the timing issue raised before the SEC addressed only the question of whether petitioner should have waited even longer before seeking to have the petition lifted. Thus petitioner was not given the

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ing petitions to lift a permanent bar from the securities industry, expressly enumerates time elapsed as a principle element in determining whether to lift the sanction. This, in conjunction with the SEC's own decisions, and argument below in the initial stage, contradicts the Second Circuit's assertion that SEC policy does not favor delay.

opportunity to make a record explaining the "delay;" in fact, petitioner was initially required to address the issue the other way, *i.e.*, to explain why he brought his petition after "only six years."

The Second Circuit's holding, that timing is an added element to a petition to lift an SEC sanction, to which the SEC applies the *Swift* standard of review, will merely create confusion in the future. Moreover, the emphasis on the timing issue is misplaced, for it is really a restatement of the reputational harm issue. (SEC Order, p. 14a, *infra*). The SEC construes *Swift* to preclude consideration of reputational harm. (SEC Order, p. 14a, *infra*). The Second Circuit followed this approach, and refused to consider harm to petitioner's reputation and employability. Had petitioner brought his case in 1986, the SEC would have applied the *Swift* standard. The result would have been the same. The *Warren* decision, on the other hand, would allow consideration of reputational harm. Thus the issue remains whether *Swift* or *Warren* should apply, and the "delay" analysis of the Second Circuit merely recast and confused that issue.

There should be no question that, had petitioner resided in the Third Circuit, and thus been able to obtain the benefit of judicial review in that Circuit, the result would have been quite different. Neither the SEC nor the Second Circuit distinguished *Warren* on the facts. *Warren* explicitly applies a lesser burden to petitioner's case than does *Swift*. Warren takes reputational harm into account in reviewing requests such as petitioner's, something the Second Circuit and the SEC expressly refused to consider. Moreover, the Third Circuit has been properly explicit regarding a

regulatory agency which refuses to follow its precedents.

> A decision by this court, not overruled by the United States Supreme Court, is a decision of the court of last resort in this federal judicial circuit. Thus our judgments in *Memorial Hospital* and *St. Vincent's Hospital* are binding on all inferior courts and litigants in the Third Judicial Circuit, *and also on administrative agencies when they deal with matters pertaining thereto.* We express no personal criticism of an independent federal agency that refuses to accept a judicial determination of this court. We attribute no ulterior motives to the distinguished members of the Board who have publicly, although respectfully, expressed disagreement with this court. But the Board is not a court nor is it equal to this court in matters of statutory interpretation. Thus, a disagreement by the NLRB with a decision of this court is simply an academic exercise that possesses no authoritative effect.

Allegheny General Hospital v. NLRB, 608 F.2d 965, 970 (3d Cir. 1979)(Emphasis added). *See NLRB v. Ashkenazy Property Management Corp.*, 817 F.2d 74 (9th Cir. 1987), app'l on remand 917 F.2d 62, *cert den.* 111 S.Ct. 2825.

The SEC did not seek review of the *Warren* holding. (See §II, *infra*). Nor has it implemented that holding by promulgating a separate standard for cases involving sanctions such as those in issue in *Warren*, *i.e.*, technical violations, isolated in circumstances,

with no apparent victim, where the petitioner expressly intends to abide by the standards called for in the sanction, and does not assert any right to act in derogation of the original order or the underlying regulatory standard. In the absence of any such standard, as the *Warren* case calls for, the only hope petitioner has of obtaining relief under that standard is litigation in the Third Circuit. There is clearly a conflict between the Circuits, which only this Court can resolve.

This case presents significant questions of law which only the Court can resolve.[4] The Second and Third Circuits are in conflict on the question of the appropriate standard of review to apply to a case such as petitioner's. The conflict is live and direct today. While the *Warren* case preceded petitioner's proceeding before the SEC by some thirteen years, the Court has recognized the existence of conflicts over a longer period of time. *See, Alamo Land & Cattle Co, Inc. v. Arizona*, 424 U.S. 295, 96 S.Ct. 910 (1976); *C.I.R. v. Stidger*, 386 U.S. 287, 87 S.Ct. 1065 (1967); *Bulova Watch Co., Inc. v. U.S.*, 365 U.S. 753, 81 S.Ct. 864 (1961). The conflict remains alive because the SEC does and will continue to administer petitions to set aside sanctions. *See, Bulova Watch, supra* (certiorari granted to resolve conflict in circuits and because question was important to administration of internal

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[4] This case presents a question of law, the standard for modifying or setting aside an order, which does not implicate the expertise of the agency below. *Federal Trade Commission v. Indiana Federation of Dentists*, 476 U.S. 447, 454, 106 S.Ct. 2009, 2016 (1986)("The legal issues presented—that is, the identification of governing legal standards and their application to the facts found—are. . .for the courts to resolve. . .").

revenue laws). Moreover, the Court has granted certiorari in the past to review proceedings involving an SEC censure. *Dirks v. SEC*, 463 U.S. 651, 652, 103 S.Ct. 3255, 3260 (1983). Without review, the SEC will continue to wedge those cases arising under the standards of *Warren* into the limited confines of *Swift*, despite the Third Circuit's mandate that the SEC impose a different standard in cases such as petitioner's.

II. This Petition Implicates Supreme Court Authority From The *Swift* Case Forward

The SEC's September 1992 Order provides as follows:

> We have consistently stated that a petitioner seeking to modify or vacate a Commission order must make "nothing less than a clear showing of grievous wrong evoked by new and unforseen conditions," the standard enunciated by the Supreme Court in *United States v. Swift & Co.* . . . We find that Miller has filed to meet the *Swift* standard.

Order, p. 11a. *infra.*

The Order thus continues a blanket application of *Swift* to all requests to vacate or modify *any* order, regardless of the nature of the order and regardless of the particular form of relief sought. This creates an issue as to whether *Swift* should be limited to its facts, and whether *Swift* has been applied beyond its facts to petitioner. The SEC has ignored those decisions, including opinions of this Court, and case law in the Second Circuit and the Third Circuit, handed down since *Swift*, compelling the conclusion that *Swift* should indeed be limited to its facts. Implication of

prior Court authorities is a separate basis for grant of certiorari. *Alamo Land & Cattle Co., supra*, 424 U.S. at 300, 96 S.Ct. at 914.

Swift concerned an injunction entered by consent to prohibit widespread practices which violated the Sherman Act, practices relating to market division and domination, and other forms of restraint of trade in the beef industry, commencing in the early part of the century through 1920. The petitioners in that case sought, after a very brief passage of time, to modify the injunction to allow a resumption of certain otherwise proscribed business activities, by the various parties, at both the wholesale and retail level. The activities in issue were expressly prohibited by the injunction and thus clearly in derogation of that injunction. As grounds for modifying the injunction to allow the resumption of otherwise prohibited activity, the petitioners cited changes in the beef industry (production and wholesale distribution) and the retail grocery industry since the entry of the injunction. The thrust of this Court's opinion was the finding that changes in the industry following entry of the injunction were not sufficient to justify a modification to the injunction to allow resumption of activity which had led to the petitioners' domination of the industry in the first place. Thus clearly in issue in the *Swift* case was the question of the standard of review to be applied when a party seeks to modify an injunction in order to circumvent or evade the very purposes of the injunction.

Petitioner did not request such relief. Petitioner sought instead, for two basic reasons, to set aside a censure which does not by its terms restrict any of petitioner's activities: (1) the censure should not have

been entered in the first place; and (2) events since the censure was entered underscore the absence of original need for the censure. Even more importantly, petitioner expressly advised the SEC he did not seek to engage in any of the practices occurring at Kidder which the SEC deemed to fall within the scope of the dual usage of securities to cover customer positions and collateralize loans. In short, petitioner did not request the right or license to act in derogation of the original order. The question arises, then, whether *Swift* should apply to a petitioner who does not seek to act in derogation of the original order.

Rigid adherence to the "clear showing of grievous wrong" language of *Swift* is misplaced. In *System Federation No. 91, Railway Employes' Department, AFL-CIO, et al. v. Wright,* 364 U.S. 642, 81 S.Ct. 368 (1961), this Court addressed a petition to modify an injunction restricting certain labor practices in light of subsequent changes in law. While the *System Federation* Court looked to the Swift opinion for guidance, it did not rely on the language the SEC has rigidly applied in this and other cases. Indeed the Court was silent regarding the "clear showing of grievous wrong" language emphasized by the SEC, and instead followed that language calling for modification of an order where it "has been turned through changing circumstances into an instrument of wrong." *System Federation,* 364 U.S. at 647, 81 S.Ct. at 371, quoting *Swift, supra,* 286 U.S. at 115, 52 S.Ct. at 462. And in *U.S. v. United Shoe Machinery Corp.*, 391 U.S. 244, 249, 88 S.Ct. 1496, 1500 (1968), this Court limited *Swift* to its facts: "In *Swift* the defendants sought relief not to achieve the purposes of the provisions of the decree, but to escape their

impact." Indeed, were the full effect of the language of *Swift* and *System Federation* given effect, petitioner's relief should have been granted. Where it is uncontested in the record that petitioner was censured following a proceeding in which material evidence tending to exonerate petitioner was suppressed by a senior executive of Kidder, the censure has become an "instrument" of that "wrong." *System Federation, supra* at 647. Thus the exclusive and rigid focus on the "grievous wrong" language of *Swift* is also in itself a basis for calling into question whether the SEC has applied *Swift* beyond its intended purpose. Moreover, even the Second Circuit has recognized: "In the realm of consent decree modifications, the Supreme Court has spoken with diverging voices." *Kozlowski v. Coughlin*, 871 F.2d 241, 246 (2d Cir. 1989). Thus, the Second Circuit Court concluded, in *Kozlowski*, that "the arduous standard promulgated" in *Swift* "assured that, initially, few modifications would occur." Accordingly, the Second Circuit Court, over the last decade, has concluded that the "clear showing of grievous wrong" language of *Swift* was "based on the specific facts then before the Court." *New York State Assoc. for Retarded Children, Inc. v. Carey*, 706 F.2d 956, 968 (2d Cir. 1983). The Court also noted: "[T]he heavy burden applied in Swift must be read in the context of that case. . ." *Id.* at 969. The *System Federation, United Shoe, Kozlowski*, and *Carey* decisions then, suggest *Swift* should be limited to the facts, *i.e.*, a petition for relief to engage in activity in derogation of the original order.

In raising this question, this petition thus implicates decisions of this Court in *Swift, System Federation*, and *United Shoe*.

III. The SEC Has Disregarded Binding Judicial Precedent in Refusing to Incorporate the *Warren* Holding Into Its Review Standards

In its efforts to circumvent the *Warren* holding, the SEC has acknowledged an essential element of petitioner's claim—the SEC's procedures for reviewing applications to set aside sanctions do not incorporate the *Warren* case. (Order, p. 11a, *infra*). Moreover, the SEC was express in the Order denying relief sought by petitioner: the SEC applies only the *Swift* standard. *Supra* at 14-15. The SEC's refusal either to contest or implement the *Warren* opinion creates an issue only the Court can resolve.

As the Seventh Circuit has noted in the context of the federal labor laws:

> This Circuit is not authorized to interpret the labor laws with binding effect throughout the whole country, and the Board therefore is not obliged to accept our interpretation
>
> ***
>
> If the Board wanted to stand pat on its *Harvstone* decision and try to take a decision by us adhering to our *Harvstone* decision to the Supreme Court, it could have done so. . .Instead it refused to acknowledge the pertinence of our decision to this case. . .

Nielsen Lithography Co. v. NLRB, 854 F.2d 1063, 1066-1067 (7th Cir. 1988); *See, Ithaca College v. NLRB*, 623 F.2d 224, 229 (2d Cir. 1989); *Allegheny General Hospital, supra*, 608 F.2d at 970; *BPS Guard Service, Inc. v. NLRB*, 942 F.2d 519, 525 (8th Cir. 1991); *Natural Resources Defense Counsel v. E.P.A.*, 966 F.2d 1292, 1300 (9th Cir. 1992).

The Seventh Circuit has correctly observed that the Circuit Courts cannot resolve the dilemma created when a regulatory agency refuses to follow judicial precedent: "The Supreme Court, not this Circuit or even all twelve circuits that have the jurisdiction to review orders of the Labor Board, is the supreme arbiter of the meaning of the laws enforced by the Board. . ." *Nielsen*, *supra*, 854 F.2d at 1066. Thus while the SEC need not "knuckle under" (*Id.*) to a particular opinion—the appropriate path for the SEC to take was a petition for writ of certiorari following *Warren*. In view of the SEC's decision not to contest the *Warren* holding, the SEC is bound by principle of *stare decisis* to abide by the *Warren* holding. The language of the SEC's Order, *supra*, shows the SEC has no intention of implementing the *Warren* Order. For this separate reason, as well, certiorari is appropriate.

CONCLUSION

For these foregoing reasons, this petition for writ of certiorari should be granted. The petition presents conflict among Circuits, implicates authority of this Court, and raises a question of the SEC's failure to follow judicial precedent. Even if timing is to be accepted as an element properly considered, the matter should be remanded to the SEC for appropriate disposition following a full development of the facts concerning petitioner's decision to bring this case in 1991.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
August Term, 1992

Docket No. 92-4210
No. 1252

GERARD A. MILLER,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

Argued March 25, 1993

Decided June 29, 1993

Before: MESKILL, *Chief Judge*, PRATT, *Circuit Judge*, and RESTANI,[1] *Judge*

Petition for review of a final order of the Securities and Exchange Commission (SEC) denying relief from a 1986 consent order issued by the SEC censuring petitioner Gerard A. Miller for willfully aiding and abetting a brokerage firm's violations of section 15(c)(3) of the Securities Exchange Act, 15 U.S.C. § 78o(c)(3) and Rule 15c3-3, 17 C.F.R. § 240.15c3-3. We deny the petition for review of the SEC's order denying relief.

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[1] Honorable Jane A. Restani of the United States Court of International Trade, sitting by designation.

DARYL J. HUDSON III, Washington, D.C., *for Petitioner.*

RANDALL W. QUINN, Senior Litigation Counsel, Securities and Exchange Commission, Washington, D.C. (Paul Gonson, Solicitor, Jacob H. Stillman, Associate General Counsel, Diane V. White, Securities and Exchange Commission, Washington, D.C., of counsel), *for Respondent.*

MESKILL, *Chief Judge*:

This is a petition for review of a final order of the Securities and Exchange Commission (SEC) denying relief from a 1986 consent order issued by the SEC, *Kidder, Peabody & Co.*, Exchange Act Release No. 22,871 [1985-1986 Transfer Binder] Fed. Sec. L. Rep. (CCH ¶ 83,963) (Feb. 6, 1986), censuring petitioner Gerard A. Miller for willfully aiding and abetting a brokerage firm's violations of section 15(c)(3) of the Securities Exchange Act, 15 U.S.C. 78o(c)(3) and Rule 15c3-3, 17 C.F.R. § 240.15c3-3. Miller seeks to have us review the SEC's order denying his petition to set aside the 1986 censure alleging that in denying him relief the SEC (1) erroneously applied the standard of *United States* v. *Swift & Co.*, 286 U.S. 106 (1932), and (2) failed to consider the impact of a 1982 Letter of Admonition from the Director of Enforcement of the New York Stock Exchange (NYSE), allegedly concealed from Miller until after he agreed to the consent order. We deny the petition for review of the SEC's order.

BACKGROUND

Miller was the Director of Operations for Kidder Peabody & Co., In.c (Kidder), a major brokerage firm. In 1986

the SEC and Miller entered into a consent decree in which he was censured for aiding and abetting Kidder in violation of Rule 15c3-3. This rule requires that customer owned securities be delivered to the customer's account after purchase and that the brokerage firm maintain sufficient capital to protect customer funds. On several occasions, Kidder practiced "dual usage" of the securities, using the securities on lists of proposed short term collateral for Kidder's lenders and in conjunction with repurchase agreements and also delivering the securities to a customer's account.

Miller, who was represented by counsel, did not admit or deny the charges against him, but consented to the entry of the censure order and its findings. The order as it pertains to Miller reads, in pertinent part:

> [F]ollowing the date of this Order . . . Miller . . .[is] prohibited from acting in any supervisory capacity with respect to the possession and control provisions of Rule 15c3-3 until one of the reports described in Section IV.2.(f) above is filed with the New York Regional Office and states that there is no indication that Registrant [Kidder] has failed to implement and comply with [these] undertakings, . . . but in no event shall the prohibition extend for a period of more than twelve months . . . from the date of this Order.

Kidder, [1985-1986 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 88,010. The order was dated February 6, 1986. Because this administrative matter was resolved by consent without an evidentiary hearing, there is no evidentiary record leading to the decree for us to consider.

Later in February, Miller learned of a 1982 letter from the Director of the NYSE Enforcement Division which informed Miller's supervisor, John T. Roche, of concerns about compliance with Rule 15c3-3. Miller claims that he would not have consented to the decree had he known earlier of this letter. Apparently Miller's argument is that

his knowledge of his superiors' awareness that the NYSE was concerned about these violations would have affected his defense strategy. Nevertheless, Miller waited until March 6, 1992, more than six years later, to petition the SEC for relief from the censure, claiming that he would have pursued adjudicatory proceedings rather than enter into the consent order if he had known earlier of the letter's existence. Essentially, he contends that in light of this "new" evidence the censure is inequitable and should be expunged or deleted from his record.

The SEC denied Miller's request to vacate the sanction because he did not meet the standard set forth in *Swift*, 286 U.S. 106. We have appellate jurisdiction pursuant to 15 U.S.C. § 78y(a).

DISCUSSION

Miller argues that in reviewing his request to expunge or set aside his censure, the SEC erroneously applied the standard enunciated in *Swift*. In *Swift*, petitioners sought to modify an injunction entered by consent, citing changes in their industry. The Supreme Court held that these changes were not sufficient to warrant a modification of the injunction, and stated that "[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions" would suffice to modify the injunction, which consisted of ongoing restrictions on their conduct. *Id.* at 119.

Miller contends that his situation is inapposite to *Swift* because he does not wish to engage in conduct in derogation of an order with present restrictions, but instead wishes to delete the order from the SEC's records as it pertains to him because it should not have been entered in the first place. He also contends that the *Swift* standard, which governs modification of the conditions of an injunction or a consent decree with ongoing restrictions, *see, e.g.*, *United States* v. *Loew's Inc.*, 882 F.2d 29, 33 (2d Cir.

1989) (modifying a consent decree with ongoing restrictions in light of changed circumstances), should not apply when a petitioner seeks to expunge or delete a consent order.

Instead, Miller urges that the correct appellate standard of review of the SEC's denial of his petition to vacate the censure is the one we announced in *King-Seeley Thermos Co.* v. *Aladdin Indus.*, 418 F.2d 31 (2d Cir. 1969). In *King-Seeley*, we reviewed an appeal seeking modification of an injunction in a trademark case. We determined that the case was not like *Swift*, which involved a "sharp conflict between wrong-doing and right-doing," but rather involved "the need for drawing the line between two kinds of right-doing." *Id.* at 35. While recognizing the reasoning in *Swift* that a change in law or fact is the clearest basis for modifying an injunction, we also recognized that sometimes the power of equity may serve to modify an injunction if "in light of experience. . .[it becomes clear] that the decree is not properly adapted to accomplishing its purposes." *Id.* Although in *King-Seeley* we expanded the *Swift* standard, it was still in the context of modifying an injunction that imposed ongoing restrictions.

No matter which standard is used here, Miller's substantial delay in seeking to vacate his censure undercuts his contention that had he known of the NYSE letter, he would not have entered into a consent decree but instead would have asked for an adjudication of the charges against him. He knew of the existence of the letter from the NYSE within days of the censure, yet failed to object to the censure at that time. He waited a full six years to seek this relief. In denying his petition for review, we have looked no only at the number of years that have elapsed, but also at Miller's explanation for the delay. In this case, Miller had all of the information that he needed to protest the consent order when he obtained the letter. Nevertheless, Miller does not tell us why he could not have

objected to the consent order soon after discovering the letter.

Miller argues that the delay was actually necessary in order to establish his reputational harm, specifically that the censure "has continued to have a material impact on [him] in the financial services industry, hampering his effectiveness and career development." But he should not have needed an extended period of time to establish harm. The harm should have been obvious as soon as the consent order was entered barring him from certain employment activities for up to twelve months. We fail to see how it would take over six years from the time the consent decree was entered to establish harm, reputational or otherwise.

The Tenth Circuit has held that it is not enough to merely allege "[c]ontinuing embarrassment. . .in business relationships" as the basis for dissolving or modifying a decree. *SEC* v. *Jan-Dal Oil & Gas*, 433 F.2d 304, 306 (10th Cir. 1970). In Miller's situation, where there were no longer any present restraints, only the record of a past sanction, the plea for relief is even less compelling.

Miller cites to an SEC administrative proceeding, *In Re Munro J. Silver*, Administrative Proceeding File No. 3-7496 (Order of Aug. 9, 1991), to support his position that delay in seeking relief from the SEC was necessary to show the detrimental effect of the recorded censure on career opportunities. At oral argument Miller stated that in the *Silver* proceeding the SEC suggested that a longer passage of time was more appropriate for reviewing a censure. We find this to be an unavailing argument here for two reasons.

First, in *Silver*, the SEC granted relief to a petitioner who had been subject to a thirty year permanent bar preventing him from associating with regulated entities absent SEC approval. Because the SEC had granted consent without restriction to associate with regulated entities each time Silver applied, the SEC ultimately lifted the per-

manent ban so that Silver could avoid the time and expense of seeking approval each time he changed positions. Unlike Silver, Miller had no such ongoing restrictions. The SEC sanctioned him for a twelve month period which expired in 1987. Miller, therefore, was not asking the SEC to relieve him of any present restrictions, but rather to erase his past record of wrongdoing so that he could lawfully avoid having to disclose it.

Second, there is no indication that the SEC favors delay in bringing petitions to vacate consent decrees. Indeed, the SEC argues persuasively that in this case, where a consent order was entered with no evidentiary hearing, delay would substantially prejudice the Commission. If sanctioned parties easily are able to reopen consent decrees years later, the SEC would have little incentive to enter into such agreements. There would always remain open the possibility of litigation on the merits at some time in the distant future when memories have faded and records have been destroyed.

CONCLUSION

We conclude that there is no valid reason for Miller to have delayed bringing to the SEC his petition to vacate his consent order of censure. In light of the unreasonable delay and substantial prejudice that the SEC would experience if it had to reexamine the case at this time, the SEC did not err in refusing to grant the requested relief, and we deny the petition for review.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION
September 21, 1992

Administrative Proceeding
File No. 3-6569

In the Matter of the Petition of

GERARD A. MILLER
New York, New York

ORDER DENYING PETITION TO EXPUNGE OR SET ASIDE CENSURE

Gerard A. Miller seeks to expunge or set aside a censure imposed against him in a Commission order date February 6, 1986 (the "Order"), entered pursuant to an offer of settlement.[1] The Order censured Miller for aiding and abetting willful violations by Kidder, Peabody & Co., Inc. ("Kidder") of the customer protection provisions between October 1983 and September 1984 while Miller was Kidder's Vice President-Director of Operations.[2] Miller argues that the censure should be set aside or expunged in light

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[1] *Kidder, Peabody & Co., Inc.*, Securities Exchange Act Rel. No. 22871 (February 6, 1986), 34 SEC Docket 2079; *see also Kidder, Peabody & Co., Inc.*, Order Instituting Proceedings, Securities Exchange Act Rel. No. 22514 (October 9, 1985), 34 SEC Docket 411.

[2] *See* Rule 15c3-3 under the Securities Exchange Act of 1934. In addition to imposing a censure, the Order conditionally suspended Miller from acting in any supervisory capacity with respect to the "possession or control" provisions of Rule 15c3-3 until certain compliance reports were submitted to the Commission's New York Regional Office; *provided*, that the suspension could not extend for a period of more than twelve months from the date of the Order. Miller's petition seeks relief from the censure only.

of his February 1986 discovery that an allegedly exculpatory letter was withheld by the chief operating officer of Kidder from the Commission and Miller during the Commission's investigation of Kidder. The Division of Enforcement opposes Miller's petition. For the reasons set forth below, Miller's petition is denied.

The pertinent facts are not in dispute. Miller's misconduct arose out of Kidder's "dual usage" of customer securities, whereby Kidder improperly pledged approximately $90,000,000 of customers' fully-paid and excess margin securities as collateral for repurchase agreements and another $55,000,000 of fully-paid and excess margin securities as collateral for bank loans. Kidder's practice of pledging these fully-paid securities placed the customers' securities at risk because, although the customers were entitled to immediate delivery of the securities, the pledgee bank had a right to take possession of the securities if Kidder defaulted on its loan obligations.

Administrative proceedings against Kidder and Miller were instituted in October 1985. Without admitting or denying the charges against him, Miller consented in the Order to findings that he wilfully aided and abetted Kidder's violations of Section 15(c) of the Exchange Act and Rule 15c3-3 (b)(1) by improperly failing to obtain and maintain physical possession or control of customers' fully-paid and excess margin securities on several dates in March and April 1984 and by failing to prepare and maintain a current detailed description of the procedures Kidder used to comply with the "possession or control" requirements of Rule 15c3-3(d)(4) between October 1983 and September 1984.[3]

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[3] The Order found that Kidder had wilfully violated Section 15(c) and 17(a) of the Exchange Act and Rules 15c3-3 and 17a-3 thereunder. Kidder was also censured and ordered to comply with several undertakings requiring the maintenance of office procedures and the submission of audited compliance reports in order to prevent future violations of Rule 15c3-3.

The central contention of Miller's Petition is that new evidence has come to his attention that he believes makes the Commission's censure against him inequitable. Specifically, Miller argues that in February 1986, after he had consented to the imposition of the censure, he learned that his immediate supervisor, John T. Roche, who was then Kidder's chief operating officer, withheld from both the Commission and Miller a letter to Roche dated February 19, 1982 (the "Letter").[4] The Letter, from the Chief Counsel/Director of Enforcement for the New York Stock Exchange (the "NYSE"), "admonishes" Kidder for dual usage problems at the firm dating from 1979, and "cautions" that NYSE disciplinary action might be taken against the firm for future violations.[5] Miller contends that had he known of the Letter prior to 1986: (1) he would have altered his compliance priorities from 1982 through 1985, taking less direction from Roche as to such priorities and placing more emphasis on dual usage problems at Kidder and less on Regulation T concerns; (2) he would have been exonerated by the Commission because the Commission would have focused greater attention on Roche's role in the violations and sanctioned Roche for the violations rather than Miller; (3) he would have retained separate counsel (rather that relying on Kidder's lawyers) to represent him during the Commission investigation; and

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[4] Miller states that he did not see the Letter until Kidder's counsel showed it to him in preparation for Miller's deposition by the NYSE on February 4, 1986.

[5] On December 3, 1986, the NYSE, pursuant to a consent order, took action against Miller based on the same practices that were the basis of the Commission's Order. It found that Miller violated NYSE rules by failing to exercise appropriate supervision to prevent violations of various rules under the securities laws, including Rule 15c3-3. The NYSE censured Miller, fined him $25,000 and suspended him for six months from holding a supervisory position with respect to the possession or control provisions of Rule 15c3-3. Pursuant to the same order, the NYSE censured and fined Roche, for, among other things, supervision deficiencies arising out of Kidder's dual usage problems.

(4) he would have made a greater effort to introduce exculpatory documents and other evidence in response to Commission document requests.[6]

We have consistently stated that a petitioner seeking to modify or vacate a Commission order must make "nothing less that a clear showing of grievous wrong evoked by new and unforseen conditions," the standard enunciated by the Supreme Court in *United States v. Swift & Company*.[7] The *Swift* standard strikes a fair balance between equitable needs for relief from an order and the need for finality of administrative decisions. We find that Miller has failed to meet the *Swift* standard.[8]

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[6] Miller did not produce a copy of the Letter with his Petition, stating that he does not have a copy of the Letter in his possession. The Division of Enforcement did, however, obtain a copy of the Letter from the NYSE and attached it to its response to the Petition as an exhibit.

[7] 286 U.S. 106, 119 (1932); *see also Sam E. Whittaker*, Admin. Proc. File No. 3-6252 (Order dated July 22, 1991); *Cranford Delano Newell*, Admin. Proc. File No. 3-6174 (Orders dated August 19, 1988 and October 3, 1985).

[8] Miller argues that we should not impose the *Swift* burden of proof upon him but instead should consider by analogy the factors used in our consideration of applications for reassociation with a regulatory entity under Rule 29 of the Commission's Rules of Practice. Because he believes Rule 29 is broad enough to encompass the "mistake" and"newly discovered evidence" grounds for setting aside a final judgment under Federal Rule of Civil Procedure 60(b), *see* a discussion Fed. R. Civ. Pro. 60(b)(1) and (2), his Petition is framed as a discussion of Rule 29 factors. We reject Miller's application of Rule 29 standards to his Petition. Rule 29 analysis is inappropriate in this matter because (1) the Order involved primarily a censure and not a bar from association with registered entities and (2) Miller asks for greater relief than we grant under Rule 29 petitions. In the Rule 29 context, we do not expunge the sanction that was originally imposed but instead permit association with a particular registrant under certain conditions. Rule 29 factors such as the respondent's course of conduct since the imposition of the sanction, character references and the "public interest" are not sufficient to justify the greater relief Miller seeks here. We also note that the *Swift* standard is clearly compatible with Rule 60(b)

The thrust of Miller's petition is that the alleged concealment of the Letter (and consequently Miller's alleged inability to take responsive compliance action at Kidder or adequately defend himself during the Commission's proceedings) constitutes a "grievous wrong" under *Swift*. In the first instance, we question whether the Letter constitutes the type of "new and unforseen circumstance" contemplated by *Swift*. Notwithstanding this concern, we note that we have previously rejected motions, based on the discovery of allegedly "new evidence" and on the asserted lack of adequate representation by counsel, that seek to disturb orders entered with the consent of the parties.[9] Moreover, an individual has no constitutional or statutory right to the effective assistance of counsel in administrative proceedings.[10]

Miller's emphasis on the Letter is misplaced because the Letter does not in any way exonerate him. Even without the Letter, Miller was independently aware that dual usage was a regulatory concern of the NYSE as early as February 1982 and throughout 1983, as reflected by the correspondence and reports *addressed to Miller* by the NYSE (that Miller attached as exhibits to the Petition). Despite knowing in 1982 about Kidder's dual usage problems, Miller

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considerations. In fact, parties must meet the *Swift* standard to prevail under the "no longer equitable" or "any other reason for relief" grounds of Rule 60(b). *See* Fed. R. Civ. Pro. 60(b) (5) and (6). Even if we were to apply Rule 60(b) to Miller's Petition, Miller has failed to establish, given all the facts and circumstances, adequate grounds under clauses (1), (2), (5) or (6) of Rule 60(b) for expunging or setting aside the censure.

[9] *See Cranford Delano Newell*, Admin. Proc. File No. 3-6174 (October 3, 1985)(denying petition to modify sanctions imposed in consent order where petitioner sought to vacate findings against him and reopen proceedings based on evidence adduced in another lawsuit).

[10] *See Cranford Delano Newell*, Admin. Proc. File No. 3-6174 (August 19, 1988)(rejecting argument that consent order containing statutory disqualification should be vacated because applicant's counsel improperly advised him as to the consequences of accepting offer of settlement).

made an independent decision to concentrate on Regulation T compliance between 1982 and 1985 because, as he states in his Petition, he regarded the dual usage problems as "not significant in a material sense" with respect to the firm's capital, its financial statement or risk to customer funds. We reject what must, despite Miller's statements in his Petition to the contrary, be viewed as his attempt to use the Letter to collaterally attack findings and decisions made at the time of entry of the Order.

Thus, the Letter is of marginal significance and its absence from the Commission's proceedings in no way prejudiced Miller. In the same vein, we reject Miller's arguments that he was denied a fair defense. We do not find, as asserted by Miller, that Kidder's counsel "deemphasized" various documents indicating Miller's efforts to comply with Rule 15c3-3. Indeed, we note that Kidder's Wells Submission argued for Miller's exclusion from the Order because of his efforts to improve the firm's compliance and that Kidder's supplemental Wells Submissions (considered by the Commission prior to entry of the Order) contained as exhibits documents that supported Miller's contention that the dual usage problems were not financially material.

Moreover, we are satisfied that Miller was aware by 1984 of substantially all information about his interests, including the NYSE's concerns in this area and Roche's level of involvement in Kidder's compliance efforts, necessary to determine the potential conflict between his interests and those of Roche and Kidder. Despite this knowledge, Miller chose to accept the risks of joint representation and agreed to the litigation approach taken.[11] Miller admits that he chose to rely on Kidder's counsel because he feared that retaining separate counsel would seem "inordinately aggressive" or send a "red flag" that

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[11] We also note that Miller consented to the NYSE order *after* learning about the Letter.

his culpability exceeded Kidder's. Thus, Miller made a strategic choice which he may not now "second guess."[12]

Finally, Miller asserts that elimination of the censure will permit him to assume a more senior position in the securities industry, for example, as a chief financial officer at a major investment bank. Initially, we note that Miller has waited nearly six years from his "discovery" of the Letter to raise this issue before the Commission. This lengthy delay in itself undermines Miller's claim that the censure has actually inflicted a "grievous wrong" upon Miller under the *Swift* standard. We also find Miller's claim that the censure's reputational taint impedes his advancement to be unsupported. Miller concedes that the censure does not preclude him from employment in the securities industry; indeed, he has held a number of senior positions in financial and administrative positions at member firms since the censure was imposed.[13] As we have previously stated, reputational harm is not sufficient in itself to justify vacating an order because such "harm" is a natural and intended consequence of the imposition of sanctions.[14] Under all the circumstances, Miller has simply not demonstrated a level of financial or occupational impairment rising to the level of a "grievous wrong" that, assuming he had satisfied the other elements of the *Swift* standard (which he has not), would merit vacating the censure.

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[12] *See David T. Fleischman*, 43 SEC 518, 520-521 (1967), quoted with approval, *Gross v. SEC*, 418 F.2d 103, 108 (2d Cir. 1969) (leave to adduce additional evidence denied where petitioner's failure to testify and present defense was a "deliberate and informed choice" of litigation strategies).

[13] Miller does not address in his Petition what efforts he has made or is making to expunge the NYSE's 1986 censure of him and what effect that sanction has on his reputation and future employment prospects (even if we were to vacate our censure).

[14] *See SEC v. Advance Growth Capital Corp.*, 539 F.2d 649, 652 (7th Cir. 1976); *SEC v. Jan-Dal Oil & Gas, Inc.*, 433 F.2d 304, 305-306 (10th Cir. 1970).

Accordingly, IT IS ORDERED that the petition of Gerard A. Miller requesting that the censure contained in our order of February 6, 1986, be expunged or set aside, be, and it hereby is, denied.

By the Commission.[15]

Jonathan G. Katz
Secretary

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[15] All of Miller's contentions have been considered. They are rejected or sustained to the extent that they are inconsistent or in accord with the views expressed in this order.

Supreme Court, U.S.
FILED
NOV 22 1993
OFFICE OF THE CLERK

No. 93-457

In the Supreme Court of the United States

OCTOBER TERM, 1993

GERARD A. MILLER, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the Securities and Exchange Commission erred in denying petitioner's request to vacate an administrative sanction imposed upon him by consent on the basis of allegedly "new" evidence, where the request was made six years after petitioner discovered the evidence.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-457

GERARD A. MILLER, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 998 F.2d 62. The order of the Securities and Exchange Commission (Pet. App. 8a-15a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1993. The petition for a writ of certiorari was filed on September 21, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In an administrative proceeding brought by the Securities and Exchange Commission, petitioner consented to the imposition of a censure based on findings that he had willfully aided and abetted violations of the Securities Exchange Act of 1934. More than six years after the censure was imposed, he petitioned the Commission to expunge or delete that censure on the basis of "new" evidence that had come to his attention shortly after the entry of the censure. The Commission denied petitioner's request. The court of appeals affirmed, holding that in light of the unreasonable delay and the substantial prejudice that the Commission would experience if it had to reopen the case, the Commission did not err in refusing to grant the requested relief.

1. Petitioner was the Director of Operations for Kidder Peabody & Co., Inc., a major brokerage firm. On February 6, 1986, the Commission entered a consent order censuring petitioner for aiding and abetting Kidder's violation of Section 15(c)(3) of the Exchange Act, 15 U.S.C. 78*o*(c)(3), and Rule 15c3-3 thereunder, 17 C.F.R. 240.15c3-3. The order also barred petitioner from acting in any supervisory capacity with respect to certain requirements of Rule 15c3-3 for a period not to exceed 12 months. Rule 15c3-3 requires, among other things, that customer-owned securities be delivered to the customer's account after purchase. Kidder had violated this rule on several occasions by using such securities on lists of proposed short-term collateral for its lenders and in conjunction with repurchase agreements. Pet. App. 2a-3a. Because the proceeding against petitioner

was resolved by consent without an evidentiary hearing, no evidentiary record was created. *Id.* at 3a.

In the same month that the consent order was entered, petitioner learned of a 1982 letter from the New York Stock Exchange to his supervisor, John T. Roche, informing Roche of concerns about Kidder's compliance with Rule 15c3-3.[1] More than six years later, petitioner asked the Commission to expunge or delete the censure. Petitioner claimed that he would not have entered into the consent order if he had known earlier of the letter's existence, and he contended that the censure was inequitable in light of this "new" evidence. Pet. App. 3a-4a.

2. The Commission denied petitioner's request to vacate the sanction. It determined that the appropriate standard to apply to petitioner's request was that used in *United States* v. *Swift & Co.*, 286 U.S. 106, 119 (1932), in which the Court required a party seeking modification of an injunction entered by consent to establish "a clear showing of grievous wrong evoked by new and unforeseen conditions." The Commission found that petitioner had not met that standard. Pet. App. 8a-15a.

3. The court of appeals denied the petition for review filed by petitioner. The court did not decide whether the Commission had, as petitioner contended, erroneously used the standard articulated in *Swift*, rather than a different standard urged by petitioner. Instead, the court held that "[n]o matter which standard is used here," Pet. App. 5a, in light of the unreasonable delay and the substantial prejudice that

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[1] Petitioner claims that Roche concealed the letter from him and from the Commission. Pet. 6.

the Commission would experience if it had to reopen the case, the Commission did not err in refusing to grant the requested relief. *Id.* at 6a-7a.

The court found that petitioner's delay was unreasonable because he had all of the information he needed to contest the order when he obtained the letter, yet he failed to explain why he did not object to the order soon thereafter. The court rejected petitioner's argument that delay was necessary in order to establish that the order resulted in reputational harm to him, because the harm should have been obvious as soon as the order restricting his supervisory activities for as long as 12 months was entered. Pet. App. 5a-6a.

The court also found that where, as in this case, a consent order was entered with no evidentiary hearing, delay would substantially prejudice the Commission: "If sanctioned parties easily are able to reopen consent decrees years later, the SEC would have little incentive to enter into such agreements. There would always remain open the possibility of litigation on the merits at some time in the distant future when memories have faded and records have been destroyed." Pet. App. 7a.[2]

ARGUMENT

This case involves a request to vacate a sanction imposed by consent in an administrative proceeding brought by the Commission pursuant to Section 15(b)(4)(E) and (b)(6) of the Securities Exchange Act,

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[2] The court further found that allegations of continuing embarrassment in business relationships would not compel relief, particularly since the consent decree imposed no ongoing restraints on petitioner's activities. Pet. App. 6a.

15 U.S.C. 78*o*(b)(4)(E) and (b)(6). There is no statutory or judicial authority regarding the standard to be used with respect to such a request to vacate. The court of appeals did not reach petitioner's argument regarding the proper standard because it held that, under any standard, petitioner would not be entitled to relief. Accordingly, petitioner's contention that the standard used by the court of appeals conflicts with "dispositive" case law is wholly meritless.

1. Petitioner argues (Pet. 9-13) that the court of appeals erred in refusing to apply the standard of review for requests to modify or vacate injunctions set forth in *SEC* v. *Warren*, 583 F.2d 115 (3d Cir. 1978), a formulation different from that in *Swift*. He contends that the court of appeals' "fail[ure] to recognize dispositive precedent" (Pet. 10) creates a conflict between its decision and the Third Circuit's decision in *Warren*. Pet. 17.

Contrary to petitioner's assertion, there is no such conflict. The Second Circuit decided this case on the basis of petitioner's six-year delay in seeking relief from the censure, holding that this unreasonable delay and the substantial prejudice that reopening the case would cause the Commission justified the Commission's refusal to grant relief. The court stated that this was the correct result "[n]o matter which standard is used," Pet. App. 5a, and it therefore did not address the appropriateness of any particular standard. Thus, petitioner's lengthy discussion of what he regards as the competing standards (Pet. 9-13) is irrelevant.

There is no merit to petitioner's contention that the use of delay as a basis for decision "has no foundation in case law or governing statutes" and

"will inevitably cause confusion to future petitioners." Pet. 13. To the contrary, the rationale for the court's decision comports with well-established principles underlying the equitable doctrine of laches as well as Federal Rule of Civil Procedure 60(b)(2), which requires that a motion for relief from final judgment based on newly discovered evidence be made within a reasonable time not to exceed one year after the judgment was entered. It can hardly "confuse" persons seeking relief based on allegedly "new" evidence to learn that a six-year delay is unreasonable.

2. Petitioner also challenges (Pet. 18-21) the adherence by the Commission to the *Swift* standard. As previously noted, however, this issue is not presented by the decision below, because the court of appeals in this case neither approved nor rejected the Commission's use of the *Swift* standard.

In any event, the Commission's choice of the *Swift* standard was entirely reasonable. Because Congress has not specified the standard to be applied by the Commission in reviewing a request to vacate sanctions imposed in administrative proceedings under the Exchange Act, the Commission's choice of a standard is entitled to deference as long as it is reasonable. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).[3]

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[3] For this reason, there is no merit to petitioner's argument (Pet. 22-23) that the Commission "disregarded binding judicial precedent" in refusing to adopt the *Warren* standard. No other circuit has followed *Warren* in *SEC* cases, and the Third Circuit itself, since *Warren*, has applied the *Swift* standard in cases arising under other statutes. See SEC C.A. Br. 18-19.

In any event, this case is wholly different from *Warren*. In *Warren*, the Third Circuit affirmed a district court order

The Commission reasonably chose the *Swift* standard, finding that it "strikes a fair balance between equitable needs for relief from an order and the need for finality of administrative decisions." Pet. App. 11a.[4]

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dissolving an injunction previously entered by the district court itself, which had the effect of eliminating any prospective, legally binding restrictions on the defendant's conduct. In this case, by contrast, the order in question was entered by the Commission, not a district court, and therefore involves questions of deference to the responsible administrative agency that were not present in *Warren*. In addition, the 12-month bar in the Commission's order expired of its own force five years ago. Petitioner thus seeks, not to prevent the Commission's order from having any ongoing legal effect (for it has none), but to have the order of censure vacated ab initio. That relief is quite different from what the district court granted in *Warren*. The Commission did not err in concluding that a *Swift*-type standard should be applied where a party seeks to have a prior order set aside in its entirety in circumstances such as these, especially where, as here, the request was based on "new" evidence that was available immediately after the prior order was entered.

[4] In support of his argument (Pet. 20-21) that the Commission's use of *Swift* was improper, petitioner cites several cases that employ a standard other than *Swift*. Those cases, however, are inapposite. *United States* v. *United Shoe Machinery Co.*, 391 U.S. 244 (1968), involved an attempt by the party that obtained an injunction to have it *strengthened*, a procedural setting that presented "the obverse of the situation in *Swift*." *Id.* at 249. *System Federation No. 91, Railway Employees' Dep't* v. *Wright*, 364 U.S. 642 (1961), held that the amendment of a statute in a way that brought the terms of a consent decree into conflict with statutory objectives justified modification of the decree. Finally, *Kozlowski* v. *Coughlin*, 871 F.2d 241 (2d Cir. 1989), and *New York State Ass'n for Retarded Children*,

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Inc. v. *Carey*, 706 F.2d 956 (2d Cir.), cert. denied, 464 U.S. 915 (1983), involved consent decrees entered into in the context of institutional reform litigation, which this Court has distinguished as a unique type of litigation in which application of the *Swift* standard is inappropriate. See *Rufo* v. *Inmates of the Suffolk County Jail*, 112 S. Ct. 748, 757-759 (1992); see also *Board of Educ.* v. *Dowell*, 498 U.S. 237, 247 (1991).

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No. 93-457

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

GERARD A. MILLER,

Petitioner.

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For the Second Circuit

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IN THE

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

I. THE ONE YEAR TIME LIMIT OF RULE 60 (b) OF THE FEDERAL RULES OF CIVIL PROCEDURE DOES NOT RESOLVE THE CONFUSION INHERENT IN THE SEC'S 1992 ORDER AND IN THE OPINION OF THE COURT OF APPEALS.

The issue before the SEC was why petitioner waited "only six years" in bringing his petition; hence petitioner was not given the opportunity to explain "delay" in the SEC record.[1]

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[1] The issue of "delay" goes only to the issue of new evidence, one of the grounds set forth in the petition before the SEC. The other two grounds are petitioner's experience since the cen-

The SEC's Division of Enforcement opposed petitioner's request for relief before the SEC in part because insufficient time had passed between the original censure and the petition for relief. The key language is quoted from the SEC's Enforcement brief:

> In *In The Matter of Munro Silver*, Administrative Proceeding File No. 3-7496 (order of August 9, 1991), the Commission granted relief from a sanction imposed in 1965 that was, in effect, a permanent bar. In *Silver*, nearly thirty years had elapsed since the Commission had imposed sanctions on the respondent. . . . *By contrast, only six years have elapsed since sanctions were imposed upon Miller.*
>
> Jt. App. A276. (Emphasis added).

The foregoing quotation from the SEC's brief in the proceedings below is significant because it reflects with accuracy the principle of the *Silver* case, and SEC policy as set forth in the SEC's Rule 29, 17 CFR 201.29. That rule explicitly states that the SEC looks to the passage of time in evaluating petitions to set aside sanctions barring persons from the securities industry. Moreover, applicable judicial authority is in accord with this view of SEC case law and policy. Thus the Tenth Circuit has noted:

> [I]n instances where the defendant concerned is an individual, and where the alleged vio-

---

sure showing compliance; and the impact of the censure on petitioner. (Pet., p. 6). The SEC and the Court of Appeals were silent regarding petitioner's experience since the censure. Both refused to consider the reputational impact of the censure on petitioner.

> lation leading to the injunction was an incident of limited scope or duration, the passage of a substantial period of time with full compliance and with no other violations may be regarded as a significant factor showing a 'change' for these purposes. In reality this is about all an individual can show under these circumstances.
>
> *S.E.C. v. Thermodynamics, Inc.*, 464 F. 2d. 457 (10th Cir.), cert. denied, 410 U.S. 927 (1973).

Despite this precedent, on which petitioner was entitled to rely in determining when to bring his petition, the SEC reversed itself *sua sponte* in the 1992 Order and stated that petitioner waited too long to bring his petition. The SEC cited no authority for this proposition; as it could not, because the authority goes the other way.[2] Indeed, the apparently unseemly haste of the *Swift* petitioners in seeking to set aside the injunction was a development noted by Justice Cardozo. *U.S. v. Swift*, 286 U.S. 106, 112-131, 52 S.Ct. 460, 461-62 (1932). Nor was petitioner allowed any opportunity to develop a record to explain his timing in bringing the petition before the SEC. (Petitioner did emphasize reputational harm in his Reply Brief on appeal. *See* § II, *infra*). Where the record before

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[2] Nor does the new evidence, the Letter of Admonition, implicate the concerns of the Second Circuit regarding faded memories and destroyed records. (Pet., p. 7a). The witness testimony and documents are preserved. Nor did the passage of time cause the SEC to feel constrained about reaching conclusions on the merits after having reviewed the new evidence on the basis of a most summary proceeding below. (Pet., pp. 120-136). There is ample record for a re-evaluation.

the SEC prior to the 1992 Order addressed *not* petitioner's "delay," but instead the apparent prematurity of his petition, it is patently unfair to penalize petitioner for not having developed the record before the SEC to include evidence explaining the "delay."[3]

The SEC's belated reliance on the policy of Rule 60(b) does cause confusion. Prior authority, including the SEC's own procedural rule and case law, and judicial authority, contemplate a petition to set aside a sanction after the passage of some time. In its Opposition Brief, the SEC has selectively promulgated a new rule, without notice, and without opportunity to develop a record before the SEC supporting the reason for the "delay."

II. THE SEC'S CALL FOR JUDICIAL DEFERENCE IS WITHOUT FOUNDATION IN LAW.

The central issue presented is whether the SEC applied an incorrect legal standard in reviewing petitioner's case. This is a question of law, and thus uniquely appropriate for this Court to review. *Federal*

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[3] At oral argument before the Second Circuit, counsel for Petitioner alluded to matters not in the record to explain, in part, Petitioner's timing. If Petitioner is given the opportunity, *e.g.*, on remand, to explain further the timing of his Petition before the SEC, he will supply evidence to show that he was advised by newly obtained counsel in 1986, after the Censure was entered and after the New York Stock Exchange Enforcement Department Letter of Admonition was discovered, that he should wait in bringing a petition to allow for the passage of some substantial amount of time, as contemplated by the SEC's rules and case law, in which to demonstrate his ongoing compliance with SEC Rule 15c3-3. Petitioner's experience since the censure tending to show compliance was ignored by the SEC and the Second Circuit.

Trade Commission v. Indiana Federation of Dentists, 476 U.S. 447, 90 L.Ed.2d 445, 454 (1986) ("The legal issues presented—that is, the identification of governing legal standards and their application to the facts found—are . . . for the courts to resolve. . ."); *Allied Chemical and Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 182 (1971) ("[T]he legal standard to be applied is ultimately for the courts to decide and enforce"). The issue is purely one of law, *i.e.*, construing a series of judicial opinions addressing the question of which standard of review is to be applied in cases such as petitioner's. As the Second Circuit found in *H.W. Wilson Co. v. U.S. Postal Service*, 580 F.2d 33, 37 (2nd Cir. 1978) "[W]hen the *question is one of law* and does not implicate the expertise of the agency, we must provide a *stricter standard of review*. . . . This particularly true when, as in the present case, *the administrator's legal decision is based on his interpretation of a judicial opinion*. . . ." *Id.* at 37 (emphasis added). Citing *Institute for Scientific Information v. U.S. Postal Service*, 555 F.2d 128, 132 (3rd. Cir. 1977). There the Second Circuit concluded that the U.S. Postal Service, *in an administrative proceeding*, had "applied an incorrect legal standard. . . ." *Wilson*, *supra*, at 37. This petition presents the same issue: whether the SEC applied an incorrect legal standard in reviewing petitioner's case. Under the standards of *Indiana Federation* and *Wilson*, *supra*, the question is one for the Court to decide freely. Petitioner does not call upon this Court to review any of the SEC's enabling statutes.

The SEC's reliance upon *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837

(1984) is misplaced. The issue in *Chevron, USA* was whether the EPA regulation allowing states to treat all pollution admitting devices within the same industrial grouping as though they were encompassed within a single "bubble" was a permissible construction of the term "stationary source" set forth in the Clean Air Act. The issue concerned not only the substantive statutory provisions relating to such curtailment procedures, but also the underlying technological issues. *Chevron, USA*, *supra*, 467 U.S. at 846-47. Such issues are best left to agency expertise. Clearly *not* in issue in *Chevron, USA*, however, was the question of what standard of review should be applied to a request or petition to modify a sanction,which *Indiana Federation*, and *Allied Chemical*, *supra* control.[4] The SEC's efforts to portray the case as one of statutory interpretation is misplaced twice over, first because it disregards the pure case law issue on appeal, *see*, *Wilson*, *supra*, and second, because to create a statutory issue, it points not to statutory language but rather to Congressional silence. (Opp. Br. p. 6).

When the proper standard of review is applied, the SEC's distinction of *SEC v. Warren*, 583 F.2d 115 (3d Cir. 1978) fails, and the conflict between the Second and Third Circuits is explicit. Here, the SEC contends for the first time, incorporating the error of the Second Circuit, that petitioner seeks to set aside the censure *ab initio* (Opp. Br., p. 7, footnote 3). The Second Circuit merely assumed this unwar-

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[4] Nor is the language in *Indiana Federation* regarding some deference where agency expertise impacts in the standard of review applicable to this appeal, which deals only with a series of injunction cases raising issues traditionally within the scope of the judicial function. *See Wilson*, *supra*, 580 F.2d at 37.

ranted conclusion without foundation in the record, asserting that petitioner seeks to "erase" the censure to "avoid having to disclose it" (Pet. at 7a). This is meritless and contrary to the arrangement assented to with the SEC Division of Enforcement, Office of Chief Counsel.[5] This issue was neither briefed nor argued before the Second Circuit, and the opinion merely assumes petitioner sought such relief. It is unfair and inaccurate for the SEC to contend that petitioner seeks *ab initio* relief where the SEC has access to its own Enforcement Division staff to verify the disclosure arrangement petitioner and his counsel reached with the SEC. Moreover, the Third Circuit noted in *Warren* that an injunction has continuing effects, even if dissolved, including disclosure implications:

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[5] The facts underlying the intended treatment of the relief sought in this case are not in the record. The Second Circuit erroneously assumed that Miller would not disclose the censure. The SEC now places this assumption before the Court. If allowed to establish a record on this new issue, Petitioner would show that Petitioner and his counsel met with the SEC Enforcement Division, Office of Chief Counsel, in April of 1992, prior to the preparation of the Enforcement Division's memorandum opposing Miller's petition before the SEC. At that conference, in response to a question from Colleen Mahoney, Esq., of the SEC, Miller assured the SEC that he would continue to disclose the censure in all appropriate securities industry disclosure forms as an historical fact with a distinct beginning and an end. Even though the SEC Enforcement Division opposed Miller's petition, it never suggested that Miller had no intention of avoiding disclosure of the censure in the future. The Second Circuit's assumption that Miller seeks to "avoid having to disclose it" (Pet. 7a) is unfounded and misplaced. This proffer is made to underscore the unwarranted nature of the SEC's recent contention that Miller seeks *ab initio* removal of the censure.

> Apparently, the injunction once issued does have significant residual effects under the federal securities laws even if dissolved. The Commission asserts that even if the court were to raise or lift the injunction, disclosure of its previous existence may be necessary, and the facts surrounding its dissolution if material to investors should Warren, Jr. become an officer or director of a public corporation.

Warren, supra, 583 F.2d at 122, note 10. Thus, even if petitioner sought relief *ab initio* as characterized by the SEC, which petitioner does not, *Warren* would remain applicable.

The Second Circuit's assertion that the outcome is the same "no matter which standard" (Pet. at p. 5a) applies, does not resolve the conflict issue. First, that statement refers only to *Swift, supra*, and *King-Seeley Thermos Co. v. Aladdin Industries, Inc.*, 418 F.2d 31 (2d Cir. 1969). No reference is made to *Warren*. Second, the reason given for denying petitioner's appeal, "no matter which standard" applies, is "delay." This emphasis on delay *is* an application of the *Swift* standard through its progeny. The stated reason for the "delay," was to show evidence of reputational harm. This factor—reputational harm—is appropriate for consideration under *Warren*. In refusing to consider reputational harm, the Second Circuit and the SEC followed the Tenth Circuit's application of *Swift* in *SEC v. Jan-Dal Oil & Gas, Inc.*, 433 F.2d 304 (10th Cir. 1970) (holding that reputational harm is not sufficient to meet the standard of *Swift*). (Pet., p. 6a). This circular reasoning—application of *Jan-Dal* and *Swift* to support a refusal to consider reputational

harm as a rationale for purportedly refusing to consider a standard other than *Swift*—is erroneous. This error, and the refusal to apply the *Warren* standard, which would allow consideration of reputational harm, is the central legal error of the SEC's order and the Second Circuit's opinion. Without acknowledgement, the Second Circuit has applied *Swift* through *Jan-Dal*. In so doing, it has disregarded *Warren*. Thus the assertion that the Second Circuit "neither approved nor rejected the Commission's use of the *Swift* standard" (Opp. Br., p. 6) is erroneous. Clearly a conflict in the Circuits exists.

Moreover, the question of delay goes only to the issue of the new evidence. It has no impact on the other grounds raised by petitioner: petitioner's "experience since the censure" having demonstrated petitioner's compliance with the SEC's Rule 15c3-3, and the "continuing negative impact" of the censure on petitioner. (Pet., p. 6). *Warren* took into account the non-reoccurrence, or isolation, of violations. (Pet., p. 11). The Order of the SEC and the Opinion of the Court of Appeals are *silent* on the question of petitioner's experience since 1986. And, as noted, neither the SEC nor the Second Circuit considered reputational harm, following *Jan-Dal*, which in turn, implements the *Swift* standard. As noted, such harm is a basis for relief under *Warren*.

Nor is the Third Circuit's post-*Warren* application of *Swift* standard relevant, where the two cases in question (Opp. Br., p. 6, note 3) concerned petitioners who sought relief to act in derogation of the original order. C.A. Reply Br. at 7. The SEC admittedly draws no distinction between petitions seeking relief to permit action in derogation of the original order, and

those, such as the current petitioner's, which do not. Petitioner's reliance on the cases limiting *Swift* is proper, as each of the cases stands for the proposition that *Swift* should be limited to its facts. Pet. pp. 20-21; Opp. Br., p. 7, footnote 4.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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